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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1028

JOSEPHINE SKENDZEL, JEAN LEGOWSKI, and BERNICE WYSOCKI,
Petitioners,

vs.

AGNES P. MARSHALL, CHARLES P. MARSHALL, and ANNA J. BLAIR,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	3
QUESTIONS PRESENTED	4
CONSTITUTIONAL PROVISIONS INVOLVED	7
RULE PROVISIONS INVOLVED	7
STATEMENT OF THE CASE	8
ARGUMENT	15
DENIAL OF DUE PROCESS OF LAW	15
DENIAL OF EQUAL PROTECTION OF LAW	23
CONCLUSION	25

APPENDIX

A. Opinion of Court of Appeals of Indiana, (1972) 289 N.E. 2d 768..... A-1

B. Opinion of Supreme Court of Indiana, (1973) 301 N.E. 2d 641..... A-9

C. Motion To Reconsider A-29

TABLE OF CONTENTS (cont.)

Page

AUTHORITIES CITED: (cont.)

Cases: (cont.)

Truax v. Corrigan, (Ariz.),
42 S.Ct. 124, 257 U.S. 312, 332,
66 L.Ed. 254, (1921)..... 19

U.S. ex rel. Vermont Inv. Co. v.
City of Cocoa, (D.C. Fla.),
17 F. Supp. 59, (1936)..... 22

Western Life Indemnity Co. v. Rupp,
(Ky.), 35 S.Ct. 37, 235 U.S. 261,
59 L.Ed. 220..... 21

Rules:

Indiana Rules of Appellate Procedure,
Rule 11..... 7, 24

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No._____

JOSEPHINE SKENDZEL, JEAN LEGOWSKI and BERNICE WYSOCKI, Petitioners,

vs.

AGNES P. MARSHALL, CHARLES P. MARSHALL and and ANNA J. BLAIR, Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

Petitioners respectfully pray that a writ of certiorari issue to review the final decree of the Supreme Court of the State of Indiana entered herein on October 4, 1973, granting transfer of this cause and completely modifying the previous decision of the Court Of Appeals of Indiana, Third District, in this cause dated December 7, 1972, both of said de-decisions reversing the judgment of the

trial court, The LaGrange Circuit Court, entered December 31, 1970, which had denied all relief to Petitioners as Plaintiffs therein. Rehearing is not permitted by the Supreme Court of Indiana, but Petitioners' Motion To Reconsider was "dismissed" on November 8, 1973, by the Supreme Court of Indiana.

OPINIONS BELOW

The judgment of the trial court was not accompanied by an opinion. The decree and opinion of the Court of Appeals of Indiana, reversing the judgment of the trial court is reported in 289 N.E. 2d 768, rehearing denied, February 7, 1973, and is set forth hereinafter in Appendix A of this Petition, pp. A-1 to A-8. The decree and opinion of the Supreme Court of Indiana, upon granting of transfer, entered October 4, 1973, is reported in 301 N.E. 2d 641, and is set forth hereinafter in Appendix B of this Petition, pp. A-9 to A-28. No petition for rehearing being allowed under the

rules of the Supreme Court of Indiana, Petitioners herein filed their Motion To Reconsider on October 24, 1973, which said Motion was thereafter dismissed as follows on November 8, 1973, by the Supreme Court of Indiana, as follows:

> "This Motion, being in the nature of a petition for rehearing, is Dismissed pursuant to Appellate Rule 11(B)(8)."

and said Motion To Reconsider is set forth hereinafter in Appendix C of this Petition, pp. A-29 to A-36.

JURISDICTION

The decree of the Supreme Court of Indiana, granting transfer as against the Petitioners herein, was dated and entered October 4, 1973. No petition for rehearing of such judgment is allowed under the Indiana Rules of Appellate Procedure, Rule 11, as amended, and none was made; although, as noted hereinabove, Petitioners filed their Motion To Reconsider which was dismissed on November 8, 1973. No extension of time within which to petition for certiorari

has been requested. The statutory provision believed to confer jurisdiction on this Court to review the judgment in question by writ of certiorari is 28 U.S.C. § 1257 and the Fourteenth Amendment to the Constitution of the United States.

The relevant portion of 28 U.S.C. § 1257 reads as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision may be had, may be reviewed by the Supreme Court as follows:
>
> ***
>
> "(3) By writ of certiorari ... where any title, right, privilege or immunity is specially set up or claimed under the Constitution ... of the United States."

QUESTIONS PRESENTED

1. Did the Supreme Court of Indiana deny and deprive Petitioners of due process of law as guaranteed by the provisions of the Fourteenth Amendment to the United States Constitution, in its action as follows:

A. Granting transfer and ordering a judgment entered in the trial court in foreclosure of a lien held to be the interest of the Petitioners, on the theory of mortgage foreclosure, without any opportunity whatsoever on the part of the Petitioners to either argue or present briefs upon the propositions determined by the Supreme Court of Indiana as the basis of its decision.

B. Ordering the entry of judgment in the trial court in foreclosure without the holding of any trial whatsoever in respect to such cause of action.

C. Exercising jurisdiction to enter a judgment requiring the entry of a judgment in the trial court upon issues which were never presented or formed, upon theories of law neither briefed nor argued at any time in said cause, in the trial court, the Court of Appeals of Indiana, nor the Supreme Court of Indiana.

D. Depriving Petitioners of their legal title in their real estate, their rights to possession of said real estate under their contract to sell said real estate; and, if the law of the State of Indiana is to be summarily changed in such fashion in respect to foreclosures of "liens", depriving Petitioners of all opportunity to recover damages for Respondents' default, attorney fees provided in said contract to sell real estate, and reimbursement for real property taxes on said real estate paid by the Petitioners to prevent the tax sale of the real estate through default of the Respondents.

2. Did the Supreme Court of Indiana deny to Petitioners the equal protection of the laws as guaranteed by the provisions of the Fourteenth Amendment to the United States Constitution, by preventing the Petitioners from presenting any argument or contentions whatsoever, oral or

written, upon and concerning the cause of action in mortgage foreclosure held to exist by said Supreme Court of Indiana although no such trial was ever held and no such appeal was ever taken or argued by the parties herein; and then refusing to rule upon the Constitutional questions presented and inherent in its sua sponte action, as presented by Petitioners said Motion To Reconsider.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 14 to the United States Constitution, in part as follows:

> "...nor shall any state deprive any person of....property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

RULE PROVISIONS INVOLVED

Appellate Rule 11 of the Indiana Rules Of Appellate Procedure, of the Supreme Court of Indiana, in part as follows:

> "(B) Transfers. In every case where a petition for rehearing has been filed in the Court of Appeals and denied the party against whom the decision is rendered shall have a right to petition the Supreme Court within twenty

(20) days from the day of the ruling on the petition for rehearing to transfer said cause to the Supreme Court for review, provided however, that the petition to transfer shall be limited to only those grounds set forth in the petition for rehearing in the Court of Appeals...

***

"(8) No petition for rehearing will be permitted filed upon the denial or granting of a petition to transfer..."

STATEMENT OF THE CASE

Petitioners are the Plaintiffs in the trial court, who filed their certain complaint in two (2) paragraphs as the owners of certain real estate in LaGrange County, Indiana, praying that the court determine and adjudge that the claim of the Defendants Marshall under the terms of a contract for the sale of said real estate to them be forfeited because of their breaches of the provisions of said contract, and, in the second paragraph, praying that the court set aside said contract for fraud. The Respondents Marshall were the initial Defendants, being the vendees in said contract, and the Respondent Anna J. Blair is

a sister of the three Plaintiffs, made a party Defendant because of her interest in the said real estate and because she did not wish to join in the action against the Defendants. The four sisters are the heirs and devisees under the will of the original Vendor, Mary Burkowske, and each have an undivided 1/4 interest in said real estate. Mary Burkowske could write nothing except a scrawled signature, and could not read the first three words on the first page of any first grade reading book. The Defendants further admitted that the contract was prepared by the attorney for the Marshalls; that the signature affixed to it, acknowledged by said attorney as a Notary Public, was not her signature, but was written on the contract by an employee of said attorney for the Marshalls; and that the said Marshalls, as Vendees, had failed to pay real estate taxes on said real estate and improvements for the year 1965, payable

in 1966, and the said taxes were again delinquent at the time of the trial. Upon the uncontradicted evidence at the trial it was further established that the Defendants Marshall had not made payment on the contract purchase price since February 15, 1965, although the contract called for payments of $2500 or more on or before before the 15th day of January of each year; that the Defendants Marshall, contrary to the requirements of said contract, had not deposited the required insurance policies with the Vendor (Plaintiffs as heirs and assignees); that the Defendants Marshall had paid only the taxes for part of the time on part of the property, Lots 20 and 21, (the income producing tavern part), in 1969; and that in addition to the taxes that Plaintiffs had already paid there was about $1900 due and delinquent at that time of trial, making a total at that time of approximately $3200 real property

taxes which Defendants Marshall had not paid though required to do so under the provisions of the said contract. Further, that while the Defendants Marshall were not paying the taxes and not paying the purchase price of the property, they were collecting the rents on the property, and prevented by objection the introduction of evidence as to how much they had collected.

The original Vendor, Mary Burkowski, died in 1963, and the Defendant Agnes P. Marshall was appointed her Executrix. The last two listed payments on the contract were in 1964 and 1965, and both Defendants Marshall and the said employee of their attorney who had written Mary Burkowski's signature all testified that Mary Burkowski was present in the office when those last two payments listed were made.

The Court of Appeals of Indiana held that since no payments had been made since February 15, 1965, default under the contract was shown as a matter of law, and

that the judgment must be reversed since the burden of proof was on the Defendants to prove their alleged affirmative defense of lack of required notice, and that while equity abhors a forfeiture, equity will not permit an executrix to waive compliance with contractual obligations owing to the estate, and then, as Vendee under the contract, assert such waiver to prevent enforcement of the contractual provisions against herself as vendee.

As hereinabove noted, the Defendants thereafter filed their petition for rehearing, which was denied, and their petition for transfer to the Supreme Court of Indiana.

The Supreme Court of Indiana, without oral argument granted, and without any contentions having been made at any time or stage in the proceedings, nor in their petition for transfer, held that:

A. A land sales contract is in es-

sence a mortgage.

B. Although the Vendor has legal title to the real estate, the conditional land contract creates a vendor's lien, closely analogous to a mortgage--his interest clearly constitutes a lien upon the real estate and should be treated as one.

C. There is great wisdom in requiring judicial foreclosure of land contracts pursuant to the mortgage statute.

D. The trial Court is instructed to enter a judgment of foreclosure on the vendors' lien, said judgment to include an order for the payment of the unpaid principal balance due on said contract, together with interest at 8% per annum from the date of judgment.

Thereafter, since such final decision of the Supreme Court of Indiana came with no forewarning, no such contentions presented by the Respondents requesting such transfer, no oral argu-

ment held in which said Supreme Court might have indicated in some way what it was going to do in this case, sua sponte, to work a change in existing law, the Petitioners herein filed a Motion To Reconsider, set out hereinafter at pp. A-29-A-36, presenting all of the questions herein argued, attempting to get a ruling and holding from said Supreme Court of Indiana on these serious constitutional questions resulting from the unexpected action taken by that Court itself, without notice and without prior opportunity to be heard in evidence, written or oral argument. But said Motion To Reconsider was dismissed by the Supreme Court of Indiana, as hereinabove noted, on November 8, 1973, since said Court viewed it as being in the nature of a petition for rehearing, such petitions being allowed after decision and opinion of that Court and of the Court of Appeals in the first instance, but not being allowed

for some reason after granting of transfer, even though the decision and opinion of the Supreme Court of Indiana is its first action in the case, and is an entirely different decision and against a different party than the decision of the Court of Appeals of Indiana.

ARGUMENT

THE SUPREME COURT OF INDIANA DENIED AND DEPRIVED PETITIONERS OF DUE PROCESS OF LAW AS GUARANTEED BY THE PROVISIONS OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, BY:

A. ORDERING ENTRY OF JUDGMENT IN TRIAL COURT IN FORECLOSURE OF A LIEN, HELD TO BE THE INTEREST OF THE OWNERS OF LEGAL TITLE, ON THE THEORY OF MORTGAGE FORECLOSURE, WITHOUT OPPORTUNITY AFFORDED OWNERS TO EITHER ARGUE OR PRESENT BRIEFS UPON BASIS OF SUCH DECISION;

B. ORDERING SAID ENTRY OF JUDGMENT WITHOUT THE HOLDING OF ANY TRIAL WHATSOEVER IN A CAUSE OF ACTION FOR FORECLOSURE;

C. ORDERING ENTRY OF FORECLOSURE JUDGMENT UPON ISSUES NEVER PRESENTED OR FORMED, UPON THEORIES OF LAW NEITHER BRIEFED NOR ARGUED AT ANY TIME OR STAGE IN THIS CASE IN ANY COURT;

D. DEPRIVING OWNERS OF LEGAL TITLE OF THEIR TITLE TO SAID REAL ESTATE, AND THEIR RIGHTS TO POSSESSION OF SAID REAL ESTATE UNDER THEIR CONTRACT TO SELL SAID REAL ESTATE, WHILE AT SAME TIME DEPRIVING THEM OF DAMAGES FOR VENDEES' DEFAULT, ATTORNEYS FEES PROVIDED IN SAID CONTRACT, AND REIMBURSEMENT FOR REAL PROPERTY TAXES PAID BY OWNERS TO PREVENT TAX SALE THROUGH DEFAULT OF VENDEES.

In this unique proceeding, the owners of legal title to real estate, having inherited the same, subject to an existing contract to sell the same to the Marshalls, which contract was prepared by the attorney for the Marshalls, are being deprived of their legal title to said real estate, their right to possession of said real estate, their attorney fees incurred in these lengthy legal proceedings to secure possession of said real estate because of the default of the Marshalls, Vendees, and more than $3200 in real property taxes paid by them when the said Vendees had failed to pay the same as required by said contract. (Pltfs' Ex. 1, R., 118-122; R., 59, 11. 14-23; Pltfs' Ex. 2, R.,

126, 127; R., 39, 11. 12-22; R., 153, 11. 23-28; Pltfs'. Ex. 4, R., p. 159; Pltfs! Ex. 5, R., p. 160; R., 297, 11. 15,16; R., 267, 11. 18-28; R., 307, 11. 14-22; R., 63-66, 75-77; R., 296, 11. 12-21; R., p. 298, 1. 26 to 303, 1. 9) All this without the commencement by said owners, Petitioners herein, of any such cause of action for foreclosure, and therefore without any trial with evidence presented on the issues of foreclosure, including the matter of attorney fees occasioned by such action; and without either or any of the parties in this action seeking the "equity" to which the Supreme Court of Indiana refers, except to the extent that the said Vendees, the Marshalls, have consistently maintained that they should not have their interest forfeited because of their admitted defaults, in view of the fact that even though they collected the rents and didn't pay their

annual purchase payments and the taxes on the real estate, they had not been given formal notice requiring the prompt payments required by the contract which their attorney drew up. They simply stopped paying on the contract several years ago, advancing no excuse for such non-payment, although the property was income-producing.

The said contract, summarized in both Court opinions, Appendix A and Appendix B, pp. A-1 to A-3, A-9 to A-11, did not refer to nor creat a lien in the Vendor, made no provision whatsoever for "foreclosure", provided for recovery of possession upon default of the Vendees, and provided no interest whatsoever on the balance of the purchase price unpaid.

In ordering a judgment "out of the blue" as to a cause of action in foreclosure of a lien which had never been filed or tried, the Supreme Court of Indiana failed to follow its own prior rulings

holding that a court is without jurisdiction to decide a case and enter a judgment on issues and theories which have not been presented.

> State ex rel. Surprise v. Porter Circuit Court, (1948), 226 Ind. 375, 382, 80 N.E. 2d 107
>
> Hutts et al. v. Martin, (1893), 134 Ind. 587, 33 N.E. 676

As stated by this Court in Truax v. Corrigan, (Ariz.), 42 S.Ct. 124, 257 U.S. 312, 332, 66 L.Ed. 254, (1921):

> "The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law,--a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society."

Where possession of property is involved, as in the case at bar, due process of law requires that there be a regular course of judicial proceedings, and that the parties to be affected shall

have notice and an opportunity to be heard; and the Supreme Court of Indiana is without right to deprive the Petitioners herein of their legal title and right of possession of their said real property without observing the general rules established in our system of jurisprudence for securing private rights;

Hagar v. Reclamation Dist. 108, (Cal.) 4 S.Ct. 663, 111 U.S. 701, (1883)

and due process requires that the Petitioners have the opportunity to contest the propriety of each step in the cause of action.

State v. Broaddus, (1926), 315 Mo. 1279, 289 S.W. 792

Notice is important and vital to procedural due process, and the notice is sufficient only if it actually results in bringing the party into court in due time to protect his interests -- and to that end the hearing required is a hearing according to that notice, and judgment entered in accordance to that notice and

that hearing.

Western Life Indemnity Co. v. Rupp, (Ky.), 35 S. Ct. 37, 235 U.S. 261, 59 L.Ed. 220

Evans v. Evans, (1917), 200 Ala. 329, 76 So. 95

The notice is sufficient if it makes it reasonably probable that the party would be apprised of what is going on.

Muldane v. Central Hanover Bank & Trust Co., (N.Y.), 70 S.Ct. 652, 329 U.S. 306, 94 L.Ed. 865

In the case at bar, the Petitioners were given no notice or warning of what was going on, until they received the first, last and only opinion and decision of the Supreme Court of Indiana, not only impairing their contract, but also depriving them of their real estate. The judgment entered was not in accordance with any trial, and wholly without notice. Petitioners had no way to protect their interests because they did not know that their legal title, and right to possession under the contract to sell, were threatened by a mortgage foreclosure judgment. They

had no opportunity to contest the propriety of a sua sponte action by the Supreme Court of Indiana converting their legal title into a lien, and in turn foreclosing their lien without trial and without damages or interest allowed for years of breach of the conditions of their contract -- it came wholly without notice or warning of any kind.

The Supreme Court of Indiana had no such reticence as that of the Court in the case of U.S. ex rel. Vermont Inv. Co. v. City of Cocoa, (D.C. Fla.), 17 F.Supp. 59, (1936), who declared: (p. 60)

> "I am aware that the constitution prohibition against the impairment of the obligation of contracts is only effective against legislative bodies (Const. art. 1, § 10), but I am of the opinion that the spirit of such constitutional prohibition should govern the courts as well as legislative bodies, and that the court should never put its seal of approval on any attempt to impair the obligation of contracts."

THE SUPREME COURT OF INDIANA DENIED AND DEPRIVED PETITIONERS OF EQUAL PROTECTION OF THE LAWS AS GUARANTEED BY THE PROVISIONS OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, BY PREVENTING THEM FROM PRESENTING ANY ARGUMENT OR CONTENTIONS WHATSOEVER, ORAL OR WRITTEN, UPON AND CONCERNING THE CAUSE OF ACTION IN MORTGAGE FORECLOSURE, AND THEIR LOSS OF LEGAL TITLE AND CONTRACT RIGHTS, AND THEN REFUSING TO RULE ON CONSTITUTIONAL QUESTIONS RAISED BY THAT SUA SPONTE ACTION OF THE COURT.

By the procedure adopted by the Supreme Court of Indiana, unlike persons appealing directly to that Court from a judgment entered upon trial of issues presented, the Petitioners were denied the equal protection of the laws in presenting their contentions and theories to said Court, and their right to be secure in their property rights in the absence of notice and hearing.

There was absolutely no opportunity afforded them to present either oral or written arguments to the Supreme Court of Indiana prior to entry of judgment and opinion by that Court; and then they were

denied the opportunity to even present to that Court the matter of denial of their Constitutional rights to due process of law when that Court summarily dismissed their Motion To Reconsider -- the only way in which they might have presented their arguments and the denial of their rights to that Court, since the Court, by said Rule 11, allowed no petition for rehearing after the granting of transfer.

There is a substantial difference between the denial of a petition or request for transfer, and the granting of such transfer, which then results in perhaps an entirely different decision and judgment by a new court.

In the case at bar, the adverse effect was even greater than the usual case of granting of transfer, since the new decision and opinion was based upon and contained rulings and changes in existing law entirely unexpected and hitherto unpresented in the case. It is respectfully

submitted that in such case the opportunity to present argument of some kind, written or oral, is essential to a fair hearing,

> Federal Communications Comm. v. WJR, The Goodwill Station, Inc., 69 S.Ct. 1097, 337 U.S. 265, 93 L.Ed. 1353,(1949)

and the Petitioners in such instance were denied their basic rights under the said 14th Amendment by the refusal of the Supreme Court of Indiana to rule on the Constitutional issues presented at their first opportunity in their Motion To Reconsider.

> Duke v. State of Texas, (D.C. Tex.), 327 F. Supp. 1218, (1971)

Therefore this Court may intercede at this stage to protect the rights of Petitioners.

> Baltimore & Ohio Ry. Co. v. U.S., 298 U.S. 349, 362-363, 56 S.Ct. 797, 80 L.Ed. 1209, (1936)

CONCLUSION

For the reasons set forth above it is respectfully submitted that this petition for a writ of certiorari should be granted; and that the decision of the Supreme Court of Indiana should be reversed, or at least

ordered vacated, with opportunity afforded Petitioners to present their arguments and contentions to said Supreme Court of Indiana.

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APPENDIX A

IN THE
COURT OF APPEALS OF INDIANA
THIRD DISTRICT

JOSEPHINE SKENDZEL, et al.,
Plaintiffs-Appellants,

vs. No. 871A166

AGNES P. MARSHALL, et al.,
Defendants-Appellees.

APPEAL FROM THE LAGRANGE CIRCUIT COURT
ALBERT M. FRIEND, SPECIAL JUDGE

HOFFMAN, CHIEF JUDGE.

This appeal is from a negative judgment on plaintiffs' complaint for possession of certain real estate. The controlling issue here presented is whether the decision of the trial court is supported by the evidence upon the elements of the affirmative defense asserted by the defendants, to-wit: that the plaintiffs waived compliance with the provisions of the contract.

The facts pertinent to our review of this case may be summarized from the record before us as follows:

On December 1, 1958, Mary Burkowski, as vendor, entered into a contract for the sale of certain described real estate to Charles P. Marshall and Agnes P. Marshall, as vendees. Such contract provided, in pertinent part, as follows:

"2. That the Vendees agree to guy and pay to the Vendor and the Vendor agrees to receive as payment for said above men-

tioned real estate, buildings and appurtenances thereunto belonging, the sum of $36,000.00, payable as follows: $500.00, at the signing, execution and delivery of this contract, the receipt whereof is hereby acknowledged; $500.00 or more on or before the 25th day of December, 1958, and $2500.00 or more on or before the 15th day of January, 1960, and $2500.00 or more on or before the 15th day of January of each and every year thereafter until the balance of the contract has been fully paid, all without interest and all without relief from valuation and appraisement laws and with attorney fees.

* * * * *

"15. Should Vendees have made prepayments or paid in advance of the payments herein required, said prepayments, if any, shall at any time thereafter be applied in lieu of further principal payments required as herein stated, to the extent of such prepayments only.

* * * * *

"17. It is further agreed that if any default shall be made in the payment of said purchase price or any of the covenants and/or conditions herein provided, and if any such default shall continue for 30 days, then, after the lapse of said 30 days' period, all moneys and payments previously paid shall, at the option of the Vendor without notice or demand, be and become forfeited and be taken and retained by the Vendor as liquidated damages and thereupon this contract shall terminate and be of no further force or effect; provided, how-

ever that nothing herein contained shall be deemed or construed to prevent the Vendor from enforcing specific performance of this agreement in the event of any default on the part of the Vendees in complying, observing and performing any of the conditions, covenants and terms herein contained. ***"

On June 27, 1968, the executrix of the estate of Mary Burkowski, deceased, acting under the terms of the last will and testament of Mary Burkowski, assigned "all of decedent's right, title and interest (in the contract) to Josephine Spendzel (Skendzel), Berniece (Bernice) Wysocki, Jean J. Legowski and Anna J. Blair, share and Share alike."

On June 2, 1969, three of the above named assignees, Josephine Skendzel, Jean Legowski and Bernice Wysocki filed their complaint against the vendees under the contract, Agnes P. Marshall and Charles P. Marshall, seeking, inter alia, to enforce the forfeiture provision of the contract and to set aside the contract because of fraud.

The vendees (Marshalls) along with Anna J. Blair, the remaining assignee, answered alleging, inter alia, the affirmative defense that plaintiffs were indulgent and failed to require compliance with the contractrual provisions making the time of payment of the essence. Further, that plaintiffs thereby cast upon themselves the duty to give specific notice to the purchasers that they would be indulgent no longer and have a present intent to make use of the forfeiture provision contained in the contract unless the defaults "be corrected within a reasonable time."

Trial was to the court without intervention of a jury. Judgment was entered that the plaintiffs take nothing upon their complaint. The timely motion to correct errors filed by plaintiffs was overruled and this appeal followed.

On appeal, the evidence contained in the record before us leads only to the conclusion that under the provisions of the contract, the vendees have defaulted. The payment schedule attached to the copy of the real estate purchase contract contained in the record before us discloses that the following payments were made:

Date	Amount Paid	Balance of Principal
12-1-1958	$ 500.00	$
12-25-1958	500.00	35,000.00
3-26-1959	5,000.00	30,000.00
4-5-1960	2,500.00	27,500.00
5-23-1961	2,500.00	25,000.00
4-6-1962	2,500.00	22,500.00
1-15-1963	2,500.00	20,000.00
6-30-1964	2,500.00	17,500.00
2-15-1965	2,500.00	15,000.00.

Both vendees testified that no payments have been made on the balance of the unpaid principal since February 15, 1965. Default under the contract is shown as a matter of law. If the judgment of the trial court is to be affirmed, the affirmative defense asserted by the defendants must be supported by sufficient evidence of probative value. In this sense we are not dealing with review of a negative judgment since the burden of proof was on the defendants to prove the affirmative defense they asserted. TR. 8(C), Indiana Rules of Procedure.

Where a contract for the sale and purchase of land contains provisions similar to those in the contract in the case at bar, the vendor may waive strict compliance with the provisions of the contract by accepting overdue or irregular payments, and having so done, equity requires the vendor give specific notice of his intent that he will no longer be indulgent and that he will insist on his right of forfeiture unless the default is paid within a reasonable and specified time.

Smeekens v. Bertrand (1969), 144 Ind.App. 656, 248 N.E. 2d 48(transfer den.);

Conner v. Fisher (1964), 136 Ind.App.511, 202 N.E. 2d 572;

McBride v. Griffith, et al. (1962), 134 Ind.App. 12, 185 N.E.2d 22;

***

However, when the time of payment is of the essence of the contract and there has been a failure to pay under the terms of the contract, and the vendor has not waived the provisions of the contract by his words or acts, no notice to cancel or forfeit the contract is required.

Conner v. Fisher, supra;

Clayton v. Fletcher Savings & Trust Co., supra. (89 Ind. App. 431, 155 N.E. 539 (transfer denied).

The vendees thus contend that specific notice was required because "(t)he evidence shows that irregular payments were made and accepted by the decedent."

A reasonable reading of the contract in question, the pertinent provisions of which have been hereinabove set forth, shows that the parties agreed that $500 would be paid upon execution of the contract; $500 would be paid on or before December 25, 1958; $2,500 or more would be paid on or before January 15, 1960, with $2,500 or more to be paid on or before January 15 of each succeeding year until the balance of the contract price was paid. The parties also agreed that any prepayment would be applied "in lieu of further principal payments."

Having applied the contractual language to the payments made by the vendees, as set forth in the above schedule, we conclude that the payments made, although irregular in time and amount, were prepayments on the unpaid balance through and including the payment due on January 15, 1965. The vendors could not have insisted on forfeiture prior to January 15, 1966, the date of the first missed payment. Up to that time the vendors waived no rights under the contract, because they were obligated to accept prepayment. Therefore, no notice was required before forfeiture since there was no waiver by accepting late or irregular payments.

It is true that circumstances could exist where waiver could be implied from a failure by the vendor to promptly insist on the time of the essence provision of the contract. For divers views on this question, see: Annot., 107 A.L.R. 345 (1937). The case at bar, however, does not present such circumstances.

There is testimony of Agnes P. Marshall and Charles P. Marshall in the record before us that the original vendor, Mary Burkowski, died in 1963. Agnes P. Marshall

one of the vendees, was executrix of her will. It was during the period of execution, January 15, 1966; January 15, 1967; and January 15, 1968, that the defaults in payment took place.

IC 1971, 29-1-13-1 (Burns, Code Edition) defines the duty of a personal representative with regard to assets of the estate, specifically debts owed to the decedent, as follows:

> "Possession of assets of estate. - Every personal representative shall have a right to, and shall take, possession of all the real and personal property of the decedent except the homestead of the surviving spouse and minor children. He shall pay the taxes and collect the rents and earnings thereon until the estate is settled or until delivered by order of the court to the distributees. He shall keep in tenantable repair the buildings and fixtures under his control and may protect the same by insurance. He may maintain an action for the possession of the real property or to determine the title to the same."

Notwithstanding that the assignees under the will of Mary Burkowski did not seek remedy under the provisions of our Probate Code. See: IC 1971, 29-1-13-16 (Burns, Code Edition). We hold that while it is true that equity abhors a forfeiture, equity will not permit an executrix to waive compliance with contractual obligations owing to the estate, and then, as vendee under the contract, assert such waiver to prevent enforcement of the contractual provisions against herself as vendee.

Being unable to find a waiver of the terms of the contract, no notice of an intention to cancel or forfeit the contract was required to be given to the vendees.

Appellees contend that the failure of appellants to name defendant Anna J. Blair in their motion to correct errors divests this court of jurisdiction. This contention has been answered by the overruling of appellees' motion to dismiss or affirm.

The judgment of the trial court is reversed and this cause remanded with instructions for further proceedings consistent with this opinion.

SHARP and STATON, JJ. CONCUR.

APPENDIX B

"IN THE
SUPREME COURT OF INDIANA

JOSEPHINE SKENDZEL, et al., Appellants,	)	
vs.	)	No. 773 S 145
AGNES P. MARSHALL, et al., Appellees.	)	

OPINION ON PETITION TO TRANSFER

HUNTER, J.

Petitioners seek transfer to this Court as a result of an adverse ruling by the Court of Appeals. Plaintiff-respondents originally brought suit to obtain possession of certain real estate through the enforcement of a forfeiture clause in a land sale contract. Plaintiff-respondents suffered a negative judgment, from which they appealed. The Court of Appeals reversed, holding that the defendant-petitioners had breached the contract and that the plaintiff-respondents had not waived their right to enforce the forfeiture provisions of the contract.

In December of 1958, Mary Burkowski, as vendor, entered into a land sale contract with Charles P. Marshall and Agnes P. Marshall, as vendees. The contract provided for the sale of certain real

estate for the sum of $36,000.00, payable as follows:

> '$500.00, at the signing, execution and delivery of this contract, the receipt whereof is hereby acknowledged; $500.00 or more on or before the 25th day of December, 1958, and $2500.00 or more on or before the 15th day of January, 1960, and $2500.00 or more on or before the 15th day of January ofeach and every year thereafter until the balance of the contract has been fully paid, all without interest and all without relief from valuation and appraisement laws and with attorney fees.' (See 289 N.E. 2d at 770.)

The contract also contained a fairly standard section which provided for the treatment of prepayments -- but which the Court of Appeals found to be of particular importance. It provided as follows:

> 'Should Vendees have made prepayments or paid in advance of the payments herein required, said prepayments, if any, shall at any time thereafter be applied in lieu of further principal payments required as herein stated, to the extent of such prepayments only.' (Id.)

The following is the forfeiture/liquidated damages provisions of the land sale contract:

> 'It is further agreed that if any default shall be made in the payment of said purchase price or any of the covenants and/or conditions herein

provided , and if any such default shall continue for 30 days, then, after the lapse of said 30 days' period, all moneys and payments previously paid shall, at the option of the Vendor without notice or demand, be and become forfeited and be taken and retained by the Vendor as liquidated damages and thereupon this contract shall terminate and be of no further force or effect; provided, however, that nothing herein contained shall be deemed or construed to prevent the Vendor from enforcing specific performance of this agreement in the event of any default on the part of the Vendees in complying, observing and performing any of the conditions, covenants and terms herein contained. * * *.' (Id.) (Emphasis added.)

The vendor, Mary Burkowski, died in 1963. The plaintiffs in this action are the assignees (under the vendor's will) of the decedent's interests in the contract. They received their assignment from the executrix of the estate of the vendor on June 27, 1968. One year after this assignment, several of the assignees filed their complaint in this action alleging that the defendants had defaulted through non-payment.

The schedule of payments made under this contract was shown by the evidence to be as follows:

"Date	Amount Paid	Total of Paid Principal
12/1/1958	$ 500.00	$ 500.00
12/25/1958	500.00	1,000.00
3/26/1959	5,000.00	6,000.00

4/5/1960	2,500.00	8,500.00
5/23/1961	2,500.00	11,000.00
4/6/1962	2,500.00	13,500.00
1/15/1963	2,500.00	16,000.00
6/30/1964	2,500.00	18,500.00
2/15/1965	2,500.00	21,000.00 "

(289 N.E. 2d at 770)

No payments have been made since the last one indicated above -- $15,000.00 remains to be paid on the original contract price.

In response to the plaintiff's attempt to enforce the forfeiture provision, the defendants raised the affirmative defense of waiver. The applicable rule is well established and was stated by the Court of Appeals as follows:

> 'Where a contract for the sale and purchase of land contains provisions sinilar to those in the contract in the case at bar, the vendor may waive strict compliance with the provisions of the contract by accepting overdue or irregular payments, and having so done, equity requires the vendor give specific notice of his intent that he will no longer be indulgent and that he will insist on his right of forfeiture unless the default is paid within a reasonable and specified time.' (289 N.E. 2d at 771, emphasis added, citing)
>
> 'Smeekens v. Bertrand (1969), 144 Ind. App. 656, 248 N.E. 2d 48 (transfer denied); Conner v. Fisher (1964), 136 Ind. App. 511, 202 N.E. 2d 572; McBride v. Griffith, et al. (1962), 134 Ind. App. 12, 185 N.E. 2d 22; Chambers et al. v. Boatright et al. (1961), 132 Ind. App. 378, 177 N.E. 2d 600; Carr et al. v. Troutman et al. (1954), 125 Ind. App. 151, 123 N.E. 2d

243; Hill v. Rogers (1951), 121 Ind. App. 798, 99 N.E. 2d 270 (transfer denied); Clayton v. Fletcher Savings & Trust Co. (1927), 89 Ind. App. 431, 155 N.E. 539 (transfer denied.)'

It follows that where the vendor has not waived strict compliance by acceptance of late payments, no notice is required to enforce its provisions. (289 N.E. 2d at 771, citing Conner v. Fisher, supra; Clayton v. Fletcher Savings & Trust Co., supra.)

In essence, the Court of Appeals found that there was no waiver because the vendors were obligated to accept prepayment, and, 'the payments made, although irregular in time and amount, were prepayments on the unpaid balance through and including the payment due on January 15, 1965.' (289 N.E. 2d 771.) The Court concluded that up to January 15, 1966, 'the vendors waived no rights under the contract, because they were obliged to accept prepayment.' (Id.) and that, '(t)he vendors could not have insisted on forfeiture prior to January 15, 1966, the date of the first missed payment.' (Id.) (We believe the Court of Appeals miscalculated here; the vendors could not have insisted on forfeiture until January 16, 1968.)

If forfeiture is enforced against the defendants, they will forfeit outright the sum of $21,000, or well over one-half the original contract price, as liquidated damages, <u>plus possession</u>.

Forfeitures are generally disfavored by the law. Carr v. Troutman (1954), 125 Ind. App. 151, 123 N.E. 2d 243. In fact, '... (e)quity abhors forfeitures and beyond any question has jurisdiction, which it will exercise in a proper case to grant relief

against their enforcement.' 30 C.J.S., Equity, §56 (1965) and cases cited therein. This jurisdiction of equity to intercede is predicated upon the fact that 'the loss or injury occasioned by the default must be susceptible of exact compensation.' 30 C.J.S., supra.

Pomeroy defines this doctrine of equitable interference to relieve against penalties and forfeitures as follows:

> 'Wherever a penalty or a forfeiture is used merely to secure the payment of a debt, or the performance of some act, or the enjoyment of some right or benefit, equity, considering the payment, or performance, or enjoyment to be the real thing intended by the agreement, and the penalty or forfeiture to be only an accessory, will relieve against such penalty or forfeiture by awarding compensation instead thereof, proportionate to the damages actually resulting from the non-payment, or non-performance, or non-enjoyment, according to the stipulations of the agreement. The test which determines whether equity will or will not interfere in such cases is the fact whether compensation can or cannot be adequately made for a breach of the obligation which is thus secured. If the penalty is to secure the mere payment of money, compensation can always be made, and a court of equity will relieve the debtor party upon his paying the principal and interest...
>
> 'The granting of relief in such circumstances is based on the ground that it is wholly against conscience to say that because a man has stipulated for a penalty in case of his omission to do a particular

act-- the real object of the parties being the performance of the act -- if he omits to do the act, he shall suffer a loss which is wholly disproportionate to the injury sustained by the other party.)' Pomeroy, Equity Jurisprudence, §433, 5th Edition (1941). (Emphasis added.)

Paragraph 17 of the contract, supra, provides that all prior payments 'become forfeited and be taken and retained by the Vendor as liquidated damages.' 'Reasonable' liquidated damage provisions are permitted by the law. See 22 Am. Jr., 2d Damages §212 (1965). However, the issue before this Court, is whether a $21,000 forfeiture is a 'reasonable' measure of damages. If the damages are unreasonable, i.e., if they are disproportionate to the loss actually suffered, they must be characterized as penal rather than compensatory. See Melfi v. Griscer Industries, Inc. (1967), 141 Ind. App. 607, 231 N.E. 2d 54; Czeck v. Van Helsland (1968), 143 Ind. App. 460, 241 N.E. 2d 272. Under the facts of this case, a $21,000 forfeiture is clearly excessive.

The authors of American Law Reports have provided an excellent analysis of forfeiture provisions in land contracts:

'As is frequently remarked, there is no single rule for the determination of whether a contractual stipulation is one for liquidated damages or a penalty, each case depending largely upon its own facts and equities, and this apothegm is fully applicable to the decisions involving provisions in land contracts for the forfeiture of payments.

'There is a plethora of abstract tests and criteria for the determination of the

nature of a contractual provision as one for a penalty or liquidated damages, and in most instances the courts struggle valiantly to make the result reached by them accord reasonably well with one or more of the more prominent of these abstract tests. But it must be observed that, in the last analysis, these factors and criteria are so vague and indefinite that it is doubtful if they are of much aid in construing a specific contractual provision, even assuming that the court makes a conscious and conscientious effort to apply them. At any rate, a reading of the cases collected herein conveys the impression that the ultimate catalyst is the court's belief as to the equities of the case before it.

'Granting this, however, certain tendencies of decision are clearly discernible in the cases. If, for example, the contract involved calls for deferred payments of the purchase price which are relatively small in amount and extend over a number of years, and if it appears that at the time of the purchaser's breach and the consequent invocation of the forfeiture clause by the vendor a comparatively small proportion of the total price remains unpaid, the courts are prone to find that the forfeiture clause was one for a penalty, at least if, as is usually the case, such a holding will tend to give the purchaser another chance to complete the purchase.

'On the other hand, if the amount of the payments received by the vendor at the time the purchase was abandoned represents but a small percentage of the total purchase price, and if the purchaser's

breach occurred soon after the execution of the agreement (and particularly if the circumstances indicate that the purchase was made for speculative purposes or that the breach represented an effort on the part of the purchaser to escape an unfortunate turn in the market), the courts tend to hold that the forfeiture clause was one for liquidated damages, with the result that the purchaser cannot recover back the payments made.' 6 A.L.R. 2d 1401 (1949).

If we apply the specific equitable principle announced above -- namely, that the amount paid be considered in relation to the total contract price -- we are compelled to conclude that the $21,000 forfeiture as liquidated damages is inconsistent with generally zccepted principles of fairness and equity. The vendee has acquired a substantial interest in the property, which, if forfeited, would result in substantial injustice.

Under a typical conditional land contract, the vendor retains legal title until the total contract price is paid by the vendee. Payments are generally made in periodic installments. Legal title does not vest in the vendee until the contract terms are satisfied, but equitable title vests in the vendee at the time the contract is consummated. When the parties enter into the contract, all incidents of ownership accrue to the vendee. Thompson v. Norton (1860), 14 Ind. 187. The vendee assumes the risk of loss and is the recipient of all appreciation in value. Thompson, supra. The vendee, as equitable owner, is responsible for taxes. Stark v. Kreyling (1934), 207 Ind. 128, 188 N.E. 680. The vendee has a

sufficient interest in land so that upon sale of that interest, he holds a vendor's lien. Baldwin v. Siddons (1910), 46 Ind. App. 313, 90 N E. 1055.

This Court has held, consistent with the above notions of equitable ownership, that a land contract, once consummated constitutes a present sale and purchase. The vendor "has, in effect, exchanged his property for the unconditional obligation of the vendee, the performance of shich is secured by the retention of the legal title.'" Stark v. Kreyling, supra, at 135. The Court, in effect, views a conditional land contract as a sale with a security interest in the form of legal title reserved by the vendor. Conceptually, therefore, the retention of the title by the vendor is the same as reserving a lien or mortgage. Realistically, vendor-vendee should be viewed as mortgagee-mortgagor. To conceive the relationship in different terms is to pay homage to form over substance. See Principles of Equity, Clark, 4th edition, Sec. 9, p. 23.

The piercing of the transparent distinction between a land contract and a mortgage is not a phenomenon without precedent. In addition to the Stark case, supra, there is an qbundance of case law from other jurisdictions which lends credence to the position that a land sales contract is in essence a mortgage:

'While the legal title remains in the vendor, the vendee in possession acquires an equitable title and the vendor holds the legal title in trust as it were for the vendee. There is an equitable conversion so that while the heirs of the vendor in case of his death must make

conveyance of the legal title, the rights of the vendor under a contract, in case of his death intestate, pass to his representatives rather than to his heirs; the title of the vendee in possession is such that in the event of his death intestate his interest in the realty descends to his heirs; so that, following the doctrine that equity deems that as done which ought to be done, the vendee in possession for all practical purposes becomes the owner of the property with all the rights of an owner in the operation of it, subject only of course to the terms of the contract; the vendor holds the legal title as security for the performance of the contract, but in effect has a vendor's lien upon the property; the status of the parties is somewhat analogous to that of mortgagor and mortgagee. 3 Pomeroy's Equity Jurisprudence (4th Ed.), p. 3042, § 1261; Champion v. Brown, 6 Johns. Ch. 398, 10 Am. Dec. 343; Sewell v. Underhill, 197 N.Y. 168, 90 N.E. 430, 27 L.R.A. (N.S.), 233, 134 Am St. Rep. 863, 18 Am. Cas. 795." Conners v. Winans (1924), 122 Misc. 824, 204 N.Y. Supp. 142, 145;

'Where one contracts to convey real estate to another upon the payment of the agreed price, retaining the title until payment is fully made, it is not very important, in our opinion, what the security so retained is called, whether a trust, a vendor's lien, an equitable mortgage, an equitable security, or any other kind of a lien. Like the Supreme Court of Tennessee:

"'We are not able to draw any sensible distinction between the cases of a legal

> title conveyed to secure the payment of a debt, and a legal title retained to secure the payment of a debt. In both cases, courts of chancery consider the estate only as security for the payment of the debt, upon a discharge of which the debtor is entitled to a conveyance in one instance, and a reconveyance in the other." Graham v. McCampbell, 19 Tenn. 52, 33 Am. Dec. 126

'Where the title is reatined by the seller as security for the payment of the debt, the security is, in this country, very generally regarded as possessing all the essential features of a mortgage, and the vendor as standing for all practical purposes as mortgagee in relation to the vendee. See 29 Cyc. pp. 770, 771, and notes; Hardin v. Boyd, 113 U.S. 764, 5 Sup. Ct. 771, 28 L. Ed. 1141; Lewis v. Hawkins, 90 U.S. 126, 23 L.Ed. 113; Wheeling Bridge & T. Ry. Co. v. Reymann Brewing Co., 90 Fed. 189, 32 C.C.A. 571; Seattle L.S. & E. Ry. Co. v. Union Trust Co., 79 Fed. 179, 24 C.C.A. 296. And as such, he seems to be regarded by statute in Idaho. Rev. St. Idaho 1887, §§ 3440, 4520, and 4521." Ferguson v. Blood (1907), 82 C.C.A. 482, 152 Fed. 98, 103; cited with approval in 243 F. 2d 478 and 373 P. 2d 565;

'...The position of a vendor in a land contract is in many respects similar to that of an equitable mortgagee. In an early case, Button v. Schroyer, 5 Wis. 598, in speaking of the relationship of a vendor and vendee in a land contract, the court said:

"'The relation between the parties is

analogous to that of equitable mortgagor and mortgagee. The former has an equity of redemption, the latter has the correlative right of foreclosure.'" Harris v. Halverson (1927), 192 Wis. 71, 211 N.W. 295, 297;

'This court has several times said that --"Where a vendor sells land, takes the notes of the vendee for the purchase money, and executes to him a bond for title, the effect of the contract in equity is to create a mortgage in favor of the vendor upon the land to secure the purchase money subject to all the essential incidents of a mortgage.' Newman v. Mountain Park Land Co., 85 Ark. 208, 107 S.W. 391, 122 Am. St. Rep. 27; Strauss v. White, 66 Ark. 170, 51 S.W. 64, and cases there cited.' Fairbairn v. Pofahl (1920), 144 Ark. 313, 222 S.W. 16, 17;

'Where a sale of land is evidenced by a contract only, and the purchase price has not been paid, and the vendor retains the legal title, the parties occupy substantially the position of mortgagor and mortgagee. The vendor has a lien for his purchase money by virtue of his contract.' Roby v. Bismarck National Bank, 4 N.D. 156, 160, 59 N.W. 719, 720, 50 Am. St. Rep. 633. See, also, First National Bank v. Zook, 50 N.E. 423, 429, 196 N.W. 507, 509.

'The general rule is that where in a contract for sale the vendor reserves title, "the transaction creates in equity the relation of mortgagor and mortgagee.'" D.S.B. Johnston Land Co. v.Whipple (1930) 60 N.D. 334, 234 N.W. 59, 61.

See also 77 A.L.R. 270 and cases cited

therein.

It is also interesting to note that the drafters of the Uniform Commercial Code abandoned the distinction between a conditional sale and a security interest. Section 1-201 of the UCC (IC 1971, 26-1-1-201 (Ind. Ann. Stat. §19-1-201 (1964 Repl.))) defines "security interest" as "an interest in personal property or fixtures which secures payment or performance of an obligation...retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer is limited in effect to a reservation of 'security interest.'" We can conceive of no rational reason why conditional sales of real estate should be treated an differently.[1]

A conditional land contract in effect creates a vendor's lien in the property to secure the unpaid balance owed under the contract. This lien is closely analogous to a mortgage--in fact, the vendor is commonly referred to as an "equitable mortgagee." D.S.B. Johnston Land Co. v. Whipple, supra; Harris v. Halverson, supra. In view of this characterization of the vendor as a lienholder, it is only logical that such a lien be enforced through foreclosure proceedings. Such a lien "has all the incidents of a mortgage" (D.S.B. Johnston Land Co. v. Whipple, supra, at 61), one of which is the right to foreclose.

There is a multitude of cases upholding the vendor's right to foreclose. (See 77 A.L.R. 276, and the cases cited therein.) The remedy is most often referred to as a foreclosure of an executory contract. (A land contract is "executory" until legal title is actually transferred to the vendee.)

A 1924 New York case best describes this remedy:

> "Out of the nature of the relationship created by a land contract, where the vendee is in possession, there have developed certain equitable remedies, among which is the right of the vendor in a proper case to sell out the interest of the vendee for the purpose of satisfying his lien under the contract, in case of default, and while it seems a misnomer, for convenience this remedy is spoken of as foreclosure, and the action as one to foreclose the contract. 3 Pomeroy's Equity Jurisprudence (4th Ed.) 3046, § 1262."
> Conners v. Winans (1924), 122 Misc. 824, 204 N.Y. Supp. 142, 145.

> See also, Keller v. Lewis (1878), 53 Cal. 113, for another excellent characterization.

The foreclosure of a land sale contract is undeniably comprehended by our Trial Rules. TR. 69 (c) deals with the foreclosure of liens upon real estate:

> "Unless otherwise ordered by the court, judicial foreclosure of all liens upon real estate shall be conducted under the same rules and the sale procedures applicable to foreclosure of mortgages upon real estate, including without limitation redemption rights, manner and notice of sale, appointment of a receiver, execution of deed to purchaser and without valuation and appraisement. Judicial lien forclosures including mortgage foreclosures may be held at any reasonable place stated in the notice of sale. In all cases where

> a foreclosure or execution sale of realty is not confirmed by the court, the sheriff or other officer conducting the sale shall make a record of his actions therein in his return to be filed promptly with the record of the case and also in the execution docket maintained in the office of the clerk." (Emphasis added.)

The vendor's interest clearly constitutes a "lien upon real estate" and should, therefore, be treated as one. The basic foreclosure statute -- that is for mortgages executed after July 1, 1957 -- provides for a six-month period of redemption, commencing with the filing of the complaint. Additionally, it establishes the procedures attendant to the foreclosure sale. The statute reads as follows:

> "Mortgages executed after July 1, 1957--Time of issuing execution -- Sale -- Notices. In any proceeding for the foreclosure of any mortgage hereafter executed on real estate, no process shall issue for the execution of any such judgment or decree of sale for a period of six (6) months after the filing of a complaint in any such proceeding:
> ***
> (Acts 1931, ch. 90, §1, p. 257; 1957, ch. 220, §1, p. 476.)"
> IC 1971, 32-8-16-1 (Ind. Ann. Stat. §3-1801 (1968 Repl.)).

TR 69(C) requires that the procedures outlined in the above statute be applied "without limitation" to the "judicial foreclosure of all liens upon real estate." We believe there to be great wisdom in requiring judicial foreclosure of land con-

tracts pursuant to the mortgage statute. Perhaps the most attractive aspect of judicial foreclosure is the period of redemption, during which time the vendee may redeem his interest, possibly through refinancing.

Forfeiture is closely akin to strict foreclosure--a remedy developed by the English courts which did not contemplate the equity of redemption. American Jurisdictions, including Indiana, have, for the most part, rejected strict foreclosure in favor of foreclosure by judicial sale:

> "The doctrine of strict foreclosure developed in England at a time when real property had, to a great extent, a fixed value; the vastly different conditions in this country, in this respect, led our courts to introduce modifications to the English rules of foreclosure.
> ***
> 55 Am. Jur. 2d, Mortgages, §549 (1971).

Guided by the above principles, we are compelled to conclude that judicial foreclosure of a land sale contract is in consonance with the notions of equity developed in American jurisprudence. A forfeiture -- like a strict foreclosure at common law -- is often offensive to our concepts of justice and inimical to the principles of equity. This is not to suggest that a forfeiture is an inappropriate remedy for the breach of all land contracts. In the case of an abandoning, absconding vendee, forfeiture is a logical and equitable remedy. Forfeiture would also be appropriate where the vendee has paid a minimal amount on the contract at the time of default and seeks to retain possession while the vendor

is paying taxes, insurance, and other upkeep in order to preserve the premises. Of course, in this latter situation, the vendee will have acquired very little, if any, equity in the property. However, a court of equity must always approach forfeitures with great caution, being forever aware of the possibility of inequitable dispossession of property and exorbitant monetary loss. We are persuaded that forfeiture may only be appropriate under circumstances in which it is found to be consonant with notions of fairness and justice under the law.

In other words, we are holding a conditional land sales contract to be in the nature of a secured transaction, the provisions of which are subject to all proper and just remedies at law and in equity.

Turning our attention to the case at hand, we find that the vendor-assignees were seeking forfeiture, including $21,000 already paid on said contract as liquidated damages and immediate possession. They were, in fact, asking for strict application of the contract terms at law which we believe would have led to unconscionable results requiring the intervention of equity. "Equity delights in justice, but that not by halves." (Story, Eq. Pl. § 72. On the facts of this case, we are of the opinion that the trial court correctly refused the remedy sought by the vendor-assignees, but in so refusing it denied all remedial relief to the plaintiffs. Equity will "look upon that as done which ought to have been done." (Story, Eq. Jur. s64(g)). Applying the foregoing maxims to the case at bar, where such parties seek unconscionable results in such an action, equity will treat

the subject matter as if the final acts and relief contemplated by the parties were accomplished exactly as they should have been in the first instance. Where discretionary power is not exercised by a trial court, under the mistaken belief that it was without this power, a remand and direction by a court of review is necessary and proper. 5 Am. Jur. 2d §773, p. 216, n.3(cases cited therein). This is not an unwarranted interference with the trial court's function. Upon appeal to this Court, we have the judicial duty to sua sponte direct the trial court to apply appropriate equitable principles in such a case. 5 Am. Jur. 2d, §656, p. 107, citing: Mark v. Kahn (1956), 333 Mass. 517, 131 N.E. 2d 758, 53 A.L.R. 2d 908. Consistent with such above-stated rules, this Court has the undeniable authority to remand with guidelines which will give substantial relief to plaintiffs under their secured interests and will prevent the sacrifice of the vendees' equitable lien in the property.

For all of the foregoing reasons, transfer is granted and the cause is reversed and remanded with instructions to enter a judgment of foreclosure on the vendors' lien, pursuant to Trial Rule 69(C) and the mortgage foreclosure statute (IC, 1971, 32-8-16-1 (Ind. Stat. Ann., §3-180 (1968 Repl.))) as modified by Trial Rule 69(C) Said judgment shall include an order for the payment of the unpaid principal balance due on said contract, together with interest at 8% per annum from the date of judgment. The order may also embrace any and all other proper and equitable relief that the court deems to be just, including the discretion to issue a stay of the judicial sale of the property, all pursuant to the provisions of Trial Rule 69(C). Such order shall be

consistent with the principles and holdings developed within this opinion.

Reversed and remanded with instructions.

ARTERBURN, C.J., DE BRULER and PRENTICE, JJ., concur in this opinion on the merits. PRENTICE, J., filing an additional statement.

GIVEN, J., dissents.

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1. In fact, the Commissioners on Uniform State Laws have recognized the transparency of any such distinctions. Section 3-102 of the Uniform Land Transactions Code (working draft of first tentative draft) reads as follows:

> "This Article applies to security interests created by contract, including mortgage...land sales contract...and any other lien or title retention contract intended as security."

We believe this position is entirely consistent with the evolving case law in the area.

APPENDIX C

"IN THE
SUPREME COURT OF INDIANA
****
No. 773 S 145
****

JOSEPHINE SKENDZEL, et al. Plaintiffs-Appellants	)	Appeal from the LAGRANGE CIRCUIT COURT
vs.	)	
AGNES P. MARSHALL, et al., Defendants-Appellees.	)	Hon. Albert M. Friend, Special Judge

****

MOTION TO RECONSIDER

The Plaintiffs-Appellants, by their undersigned counsel, now herein respectfully move and request that the Supreme Court of Indiana reconsider its decision and opinion heretofore filed with the Clerk of this Court on October 4, 1973, and in support hereof respectfully show and invite the attention of the Court to the following matters set forth in said decision and opinion, and in the Record of the Proceedings herein:

1. This Court, in said decision and opinion, held that:

A. Transfer was granted;

B. Stark v. Kreyling, (1934), 207 Ind. 128, 188 N.E. 680, held that:

(1). The vendee, as equitable owner, is responsible for taxes.

(2). The vendor, has, in effect,

exchanged his property for the unconditional obligation of the vendee, the performance of which is secured by the retention of the legal title.

(3). A land sales contract is in essence a mortgage.

C. A conditional land contract in effect creates a vendor's lien in the property to secure the unpaid balance owed under the contract, such lien being closely analogous to a mortgage.

D. The vendor's interest clearly constitutes a lien upon real estate and should, therefore, be treated as one.

E. There is great wisdom in requiring judicial foreclosure of land contracts pursuant to the mortgage statute.

F. A conditional land sales contract is in the nature of a secured transaction, the provisions of which are subject to all proper and just remedies at law and in equity --

G. The Plaintiffs-Appellants, as vendor-assignees were seeking forfeiture, asking for strict application of the contract terms at law which would have led to unconscionable results requiring the intervention of equity.

H. The trial Court is instructed

to enter a judgment of foreclosure on the vendors' lien, said judgment to include an order for the payment of the unpaid principal balance due on said contract, together with interest at 8% per annum from the date of judgment.

2. Said decision and opinion of this Court was entered without any opportunity whatsoever on the part of the Plaintiffs-Appellants to argue or present briefs upon the propositions determined by this Court as the basis of its decision.

3. Said decision and opinion of this Court totally ignores the facts of record that:

A. Neither Plaintiffs nor Defendants sought the Equity to which this Court refers, and the Defendants, seeking transfer herein, did not make such application upon the grounds and theory determined by this Court.

B. The cause was not tried on the theory of foreclosure, and the defense advanced in the trial Court, the Court of Appeals of Indiana, and this Court was lack of notice and waiver of strict compliance.

C. The Defendants simply stopped paying on the contract, several years before the cause was tried, and have advanced no excuse for such non-payment, although the property is income-producing.

D. The Plaintiffs have themselves advanced large sums of money on real

property taxes to prevent the sale of the real estate for delinquent taxes, but since the cause was tried on the theory of forfeiture rather than on the theory of foreclosure, the amounts paid were not in issue and are apparently lost to Plaintiffs by the decision of this Court, including subsequent tax payments.

E. The REAL ESTATE PURCHASE CONTRACT in this case did not refer to nor create a lien in the Vendor, but did contain the following pertinent parts:

> '*** it is mutually agreed as follows:
> 1. That the Vendor agrees to sell and the Vendees agree to buy***'
>
> ***
>
> '*** all without interest and all without relief from valuation and appraisement laws and with attorney fees.'
> (Emphasis added)

4. Said decision and opinion of this Court in effect and substance has:

A. Without hearing deprived Plaintiffs-Appellants of their real estate, their moneys paid for real property taxes which was the contract obligation of the Defendants-Appellees, and their reasonable attorney fees for this litigation at all stages (if this ordered judgment in foreclosure is to stand although no such trial was held), in violation of Article 1, Section 12 of the Constitution of the State

of Indiana, and Section 1 of the 14th Amendment of the Constitution of the United States.

B. Without compensation taken Plaintiffs-Appellants' said property, in violation of Article 1 Section 21 of the Constitution of the State of Indiana, and said Section 1 of the 14th Amendment of the Constitution of the United States.

C. Granted to the Defendants-Appellees said privileges and immunities which, upon the same terms do not equally belong to all citizens, in violation of Article 1, Section 23 of the Constitution of the State of Indiana, and said Section 1 of the 14th Amendment of the Constitution of the United States.

D. Impaired the obligation of the contract between the Plaintiffs-Appellants and the Defendants-Appellees, ex post facto, in violation of Article 1, Section 24 of the Constitution of the State of Indiana, and said Section 1 of the 14th Amendment of the Constitution of the United States.

E. Invaded the power of the Legislature by changing the existing law in the State of Indiana in respect to conditional sales contracts for the sale of real estate, in violation of Article 3, Section 1 of the Constitution of the State of Indiana, and Article 4, Section thereof.

F. Denied Plaintiffs-Appellants the equal protection of the laws, in violation of Section 1 of the 14th Amendment of the Constitution of the United States, in this: that the decision of the Court,

setting aside the decision of the Court of Appeals of Indiana and ordering the entry of a judgment wholly unsupported by a trial of any issues supporting such judgment, was entered upon a granting of transfer without compliance with the applicable Rule of this Court in respect to grounds asserted for transfer (Appellate Rule 11) either in respect to said grounds or in respect to the requirement that such grounds be first submitted to the Court of Appeals in a petition for rehearing; and that said decision of this Court and Appellate Rule 11, Subsection (8), forbidding a petition for rehearing, has decided this cause adversely to these Plaintiffs-Appellants without trial, without opportunity to brief and argue in the Court of Appeals of Indiana, without opportunity to respond to a petition for rehearing in said Court of Appeals of Indiana, without the opportunity to respond to a petition for transfer in this Court, without opportunity to argue in this Court, and without opportunity to present a petition for rehearing in respect to the decision entered against them without any prior due process of law.

WHEREFORE, Plaintiffs-Appellants respectfully move that upon reconsideration of said decision of October 4, 1973, this Court either vacate said opinion, or modify said decision so that the trial Court shall hold a hearing and allow Plaintiffs-Appellants judgment for all sums paid by them prior to such hearing for real property taxes upon said property, judgment for interest at the rate of 8% upon all such sums paid for such taxes and all delinquent amounts due under said contract which were wrongfully withheld by Defendants-

Appellants, judgment for punitive damages against the said Defendant Agnes P. Marshall for withholding all payments by herself to herself as Executrix of the Estate of the deceased Vendor, judgment for punitive damages against the said Defendant Charles P. Marshall for drawing up such a contract leaving the deceased vendor, for whom he was attorney, only a lien upon her real estate sold to himself without interest on the undue balance, and judgment for reasonable attorney fees for the trial of said cause and the appeal herein, (or that this Court pursuant to its powers under Appellate Rule 15(M)(6) order such attorney fees entered in an amount determined by this Court). (In suggesting relief alternative to vacating the opinion and decision, Plaintiffs-Appellants do not acceed to or accept such decision as modified as fair and just, and do not intend thereby to waive their right to consider further judicial review, after seeking herein to have the devastating effect of the adverse decision of this Court lessened in degree.)

Respectfully submitted,

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MEMORANDUM

It is respectfully submitted that in the case of Stark v. Kreyling, (1934), 207 Ind. 128, 188 N.E. 680, relied upon by this Court, supra, the contract required the vendee to pay the taxes, the case concerned tax law, as to what was taxable, the Court did not hold that a land sales contract is in essence a mortgage, and the Court did hold that the contract in that case was not a contract to sell, but rather a present sale, because 'under its terms' it was provided that the Willard Library Association 'has this day sold' and that Kreyline 'has this day purchased' the real estate; and the Court held that Kreyling 'was the owner for purposes of taxation.'

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